

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WATER COUNCIL

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Appeal of the Board of Directors of Save Our Groundwater  
Docket No. 04-17 WC

**OBJECTION TO THE MOTION TO DISMISS THE APPEAL**

The Board of Directors of Save Our Groundwater [SOG] objects to the NHDES's motion to dismiss the appeal because NHDES fails to understand the relationship between the Water Council's role under RSA 21-O and the provisions of RSA 485-C. This appeal is correctly before the Water Council because of the Water Council's mandate under RSA 21-O to review all decisions of the Department's Water Division, except wetlands issues. Since it is not a wetlands issue, the Motion to Dismiss should be denied.

The NHDES Motion to Dismiss is based upon a failure by NHDES to correctly use the relationship between RSA 21-O, which establishes a mandatory review, by the Water Council of all decisions by the Water Division of NHDES and RSA 541, which establishes uniform procedures for rehearing and appeals. The correct interpretation of the two statutes is that the Water Council is required to hear this appeal under RSA 21-O and its hearing is consistent with the procedures set out in RSA 541.

## **BACKGROUND**

SOG filed an appeal to the decision of July 1, 2004 granting a Large Groundwater permit to USA Springs Inc. on July 30, 2004 requesting an Adjudicative Hearing in accord with Env-Ws 388.23. Relying on the equal protection and due process clauses of both the Federal and State Constitutions SOG expected that such an Adjudicative Hearing would be before the Water Council. At the same time SOG filed a Motion for Rehearing with NHDES also appealing the decision of July 1, 2004. On August 9, 2004 NHDES rejected SOG's Motion for Adjudicative Hearing using faulty information on the Administrative Procedures Act. SOG replied on August 23, 2004 [see Save Our Groundwater, Board of Directors Notice of Appeal], hereinafter Notice of Appeal. On August 31, 2004 SOG filed a Revised Notice of Appeal, hereinafter Revised Notice, responding to both the faulty information regarding RSA 541-A and attempting to clarify the relationship between RSA 541 and RSA 485-C.

The Motion to Dismiss still uses the faulty arguments raised in the August 9, 2004 denials.

Specifically, NHDES state "the only means" by which an appeal can be taken is RSA 541, which ignores the clear reading of RSA 21-O, which states that the Water Council is the first step after the 'department decision'. RSA 21-O: 14 goes on to state that persons aggrieved by the appeal "before any council" may appeal such results in accordance with

RSA 541. Therefore, the clear reading would be NHDES issues the “department decision” an appeal is made to the Water Council and if the aggrieved party so chooses an appeal is made to the Supreme Court. In both the denials of August 9, 2004 and the Motion to Dismiss NHDES relies on Supreme Court decisions, which predate RSA 485-C and RSA 541-A, which results in the strained interpretation that somehow the Water Council has no review of the matter despite what RSA 21-O states. It is SOG’s contention that a reading of both statutes would show that a hearing in accord with RSA 21-O *is consistent* with RSA 541, since the next step after the Water Council would be to the Supreme Court. In the Revised Notice, SOG presented Court cases, which supported this position. [Revised Notice at 4 and 5]. The Court requires that statutes be read in harmony with the overall statutory scheme. It requires that statutes be construed so they do not contradict each other. [Nillson v. Bierman 150 NH 393, 2003].

NHDES urges a broader reading of RSA 485-C: 21 than it is due. The section does not state, as it could have if the legislative intent was as NHDES urges, that the Water Council will not be involved in appeals from large groundwater withdrawal permits. It simply states that rehearing and appeals under this section shall be in accordance with RSA 541. Of course, appeals from the Water Council decisions are in accordance with RSA 541 as set forth in RSA 21-O: 14. RSA 485-C and RSA 21-O can be and should be read consistently to give effect to both, with review first by the Water Council and ultimately appeal in accordance with RSA 541.

NHDES, in its Motion to Dismiss states that SOG had to file a Motion by August 2, 2004. As stated above SOG filed two motions on July 30, 2004. Again NHDES is, as it did in the appeal denials, trying to confuse the issue so that the only appeal is to the Supreme Court, bypassing the Water Council. [See SOG Rehearing Motion # 13 at 9 and 10] Both denials of August 9, 2004 were filed within the thirty days provided by regulation.

WHEREFORE, for the reason stated above, and in our Revised Notice of Appeal, Save Our Groundwater respectfully requests that the Water Council deny NHDES's Motion to Dismiss and schedule this matter for a hearing.

Respectfully submitted,

SAVE OUR GROUNDWATER  
BOARD OF DIRECTORS, Pro Se

  
By, Bill McCann, Board Member

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed first class, and postage prepaid to Michael Nolin, NHDES, Harry Stewart, NHDES, Mark Beliveau, Esq., Armand M. Hyatt, Esq. E. Tupper Kinder, Esq. Tony Soltani, Esq. and Assistant Attorney General Richard Head.

  
Bill McCann, Board Member